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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

RAHINAH IBRAHIM, an individual,

Plaintiff,

vs.

DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

Case No. C 06-0545 WHA

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS (REDACTED)

Date: March 20, 2014
Time: 8:00 a.m.
Ctrm: 8 – 19th Floor
Judge: The Hon. William Alsup

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INTRODUCTION

The government's bad-faith acts in this case include the following:

- Wrongly branding as a terrorist a law-abiding, mild-mannered scholar, resulting in her jailing, physical pain, humiliation, and banishment from the land she considers a second home. Defendants revealed Dr. Ibrahim's status to airline personnel in the United States and Malaysia, the San Francisco police, and the dozens of people who saw Dr. Ibrahim get arrested. Eventually, Dr. Ibrahim had no choice but to reveal to her colleagues why she could not travel here because it affected her duties as a leader at her university.

- Revoking Dr. Ibrahim's valid student visa without notice and without giving her the opportunity to show why the visa should not be revoked, because it was too difficult to get the FBI on the phone to learn the true facts. [TX 16 ("These revocations contain virtually no derogatory information….case agents don't call you back promptly, if at all"); 22 C.F.R. § 41.122(c)]. Dr. Ibrahim was mortified when she learned for the first time at the airport in Malaysia she could not return to Stanford to finish her dissertation.

- Refusing to provide Dr. Ibrahim any facts concerning the government's action or lack of action after she petitioned for redress. [TX 40].

- Attempting to dismiss Dr. Ibrahim's case at least four times because she allegedly suffered no harm even though the government knew it incorrectly watchlisted her. [Dkts. 63, 167, 373 (federal defendants' motions to dismiss), 534 (federal defendants' motion for summary judgment)].

- Claiming that it would harm national security to tell an innocent person that she is innocent. [Dkts. 534 (federal defendants' motion for summary judgment at p. 23 ("This case could not proceed further because the privileged evidence excluded by the state secrets privilege would inherently be at issue in further proceedings or at risk of disclosure."); 602 (federal defendants' trial brief at p. 1 ("[A] trial in this case will necessarily require information protected by the state secrets privilege.")].

- Intentionally blocking Dr. Ibrahim from traveling to testify twice (2009 and 2013) and mysteriously sending a "POSSIBLE NO-BOARD" request for her daughter as well. Defendants not only denied Dr. Ibrahim's visa in 2009 and scrawled "terrorist" on the denial letter, they also used the application as an opportunity to REDACTED [redacted]. [TX 47 (visa denial); TX 9, 57].

- Secreting the truth from the public and plaintiff at every opportunity. The government even claimed that publicly available information was protected by the state secrets privilege and other privileges. For example, high government officials swore under penalty of perjury that whether or not plaintiff was the subject of an international terrorism investigation was a state secret. To the contrary, publicly available documents revealed that fact. [Dkt. 472 (Holder Decl.); Dkt. 471 (Clapper Decl.); TX 506 at p. P001863 (FOIA document noting the "315" classification for international terrorism investigations; TX 516 at p. 4 (FBI website describing the same)].

- Forcing the press and public to leave proceedings in a United States courtroom in violation of the public's First Amendment right of access.

There is no excuse for the government's behavior. Congress enacted the Equal Access to Justice Act (EAJA) to enable under-funded private litigants to challenge unjustified actions like those undertaken by the government in this case. Plaintiff's counsel and plaintiff persevered in the face of overwhelming odds and showed unusual dedication to combatting the government abuses in this matter. The substantial fees and costs incurred were reasonable and necessary in light of the government's tactics. Therefore, plaintiff respectfully requests compensation for fees and expenses.

LEGAL ARGUMENT

I. PUTTING AN INNOCENT WOMAN ON A TERRORIST WATCHLIST, CAUSING HER WRONGFUL ARREST AND HUMILIATION, AND COVERING IT UP FOR NINE YEARS, ARE THE EPITOME OF BAD FAITH.

The government knowingly and recklessly committed and concealed its errors for the improper purpose of protecting itself from embarrassment and denying plaintiff redress for erroneous denial of the right to travel and other protected constitutional rights. No matter what the government says to explain that decision after the fact, the shocking conduct that started this case and the intentional refusal to accept responsibility for it sorely harmed an innocent person. Defendants do not dispute that the Court must consider both the governmental action that precipitated the litigation as well as the defendants' litigation posture in determining bad faith. *See Rawlings v. Heckler*, 725 F.2d 1192, 1195-96 (9th Cir. 1984).

As summarized above, the bad faith is egregious in this instance. The Ninth Circuit has found that the government acted in bad faith under Section 2412(b) and awarded market-rate attorneys' fees in analogous circumstances involving the government's violation of statute, inexcusable delay in producing documents, calloused indifference towards plaintiff, and invocation of meritless defenses. *See Brown v. Sullivan*, 916 F.2d 492, 496-97 (9th Cir. 1990) (violation of statute requiring record examination and inexcusably delayed production of documents); *Cazares v. Barber*, 959 F.2d 753, 755 (9th Cir. 1992) ("arrogant and calloused attitude" against pregnant, unmarried high school student); *Rodriguez v. United States*, 542 F.3d 704, 711-12 (9th Cir. 2008) (no reasonable suspicion to support privilege defense).

The government's bad faith is demonstrated not only by the FBI agent's recklessness

(although it remains suspicious that Agent Kelley watchlisted Dr. Ibrahim *before* even meeting her), but also the government's calloused indifference toward discovering, acknowledging, and rectifying this error and its widespread consequences. Furthermore, the government's defense proceeded for the improper purpose of concealing this reckless error, not to protect national security. Defendants harassed plaintiff at every opportunity, in violation of federal law and the Constitution. By law, the government's bad faith conduct requires that the Court award plaintiff full fees at market rates to deter the government from such behavior in the future.

II. DEFENDANTS' CORE LEGAL POSITION—THAT THE COURT SHOULD THROW OUT THE CASE—LACKED JUSTIFICATION.

Defendants have the burden of showing their actions were "substantially justified" within the meaning of the EAJA. *See Edwards v. McMahon*, 834 F.2d 796, 802 (9th Cir. 1987). They fail to carry their burden. "While the parties' postures on individual matters may be more or less justified, the EAJA – like other fee-shifting statutes – favors treating a case as an inclusive whole, rather than as atomized line-items." *Commissioner, INS v. Jean*, 496 U.S. 154, 161-62 (1990). Defendants' arguments that (a) their post hoc REDACTED [redacted] was permissible under their own flexible standards; (b) their serial unsuccessful motions to dismiss on procedural grounds were justified; and (c) this was a case of "first impression" do not show that their position was justified under the totality of the circumstances. None of these arguments is sufficient – either alone or in combination – to show that watchlisting an innocent woman, revoking her visa without examining the underlying facts, providing misleading information in response to her subsequent visa application, and repeatedly denying her a process through which she could contest these actions, was justified.

Defendants' REDACTED [redacted] provides no justification for their actions, because it provides no reasonable basis for believing Dr. Ibrahim herself presented a terrorist threat, or that allowing an innocent person who already has been denied boarding to clear his or her name would pose any threat to national security that would trump that person's right to due process. Defendants refused to admit or publicly acknowledge Dr. Ibrahim's

innocence until the Court forced them to. Defendants' response to plaintiff's request for redress in the form of her PIVF was inadequate to meet the requirements of due process. (Under Seal Findings, p. 29:1-16.) No reasonable person could conclude that defendants' opaque system allowed Dr. Ibrahim adequate due process protections. Defendants' REDACTED does not change that.

The government's jurisdictional arguments were unreasonable. Unlike *Gonzales v. Free Speech Coalition*, 408 F.3d 613, 619-20 (9th Cir. 2005), cited by defendants, in which the government could point to a string of successes in four circuit courts, defendants here suffered a string of losses on their standing argument. (*See* Dkt. 197, pp. 7:2-10:2; *Ibrahim v. DHS*, 669 F.3d 983, 992-94 (9th Cir. 2012) (*Ibrahim II*); Ninth Circuit Case No. 10-15873, Dkt. 76 (denying defendants' petition for rehearing); Dkt. 399; Under Seal Order Granting In Part And Denying In Part Motion For Summary Judgment, pp. 6:8-7:17.) Defendants never once prevailed on this argument at any stage of the proceedings.[1]

Likewise, defendants' jurisdictional argument based on the mistaken premise that the challenged actions are orders of the TSA, reviewable only in the circuit courts, has been thoroughly rejected by the Ninth Circuit Court of Appeals. *Ibrahim v. DHS*, 538 F.3d 1250, 1254-56 (9th Cir. 2008) (*Ibrahim I*); *Latif v. Holder*, 686 F.3d 1122, 1127 (9th Cir. 2012) (*Latif I*) (*citing Ibrahim I*); *see also Latif I*, 686 F.3d at 1127-30 (holding 49 U.S.C. § 46110 posed no barrier to adding TSA as a party). Nor was defendants' state secrets argument substantially justified. Rather, it was properly rejected by this Court as a basis to dismiss the case, after defendants did an about-face on their intent to rely on secret information. On the whole, defendants' most recent loss in this Court represents one in a series of incremental losses over time, in defendants' effort to protect their highly secretive program from judicial review, even if

[1] Defendants quote one of plaintiff's briefs out of context in support of their misstatement that they had to correct erroneous representations made to the Ninth Circuit. Plaintiff's statement in an appellate brief that Dr. Ibrahim was told there was a note next to her name calling for her arrest when she last tried to fly is accurate in the context in which it appears, which concerned Dr. Ibrahim's efforts to travel to the United States. (Dkt. 709-1, Freeborne Decl., Exh. 1, at pp. 3, 13.)

it means that innocent people remain blacklisted as terrorists. *See Ibrahim I*, 538 F.3d at 1254-56; *Ibrahim II*, 669 F.3d at 992-97; *Latif I*, 686 F.3d at 1127-30; *Latif v. Holder*, No. 3:10-CV-00750, 2013 WL 4592515, at *7-8 (D. Or. Aug. 28, 2013) (*Latif II*); *Mohamed v. Holder*, No. 1:11-CV-50 (AJT/TRJ), 2014 U.S. Dist. LEXIS 7833, at *1-2, 56-57 (E.D. Va. Jan. 22, 2014) (denying defendants' motion to dismiss).[2]

Even more importantly, the analysis of substantial justification requires the Court to consider the underlying factual basis for defendants' acts. Although this was the first watchlist placement challenge to go to trial and the issues were complicated, there was no factual support for the assertion that Dr. Ibrahim herself posed or poses any kind of terrorist threat. (*See* Under Seal Findings, Findings of Fact Nos. 5, 7, 37, 45, 49-50, & 64.) In spite of this, defendants persisted in misidentifying Dr. Ibrahim as such on her 2009 visa rejection notice, and in allowing their previous misidentification to go uncorrected as far as she and the public were concerned. They used procedural arguments and executive privileges to try to hide their mistake, even after those procedural arguments and privilege objections had been rejected or overruled.

The groundbreaking nature of the relief does not render defendants' position justified. From *Green v. TSA*, 351 F. Supp. 2d 1119 (W.D. Wash. 2005), to *Latif*, the No-Fly List plaintiffs have been arguing for meaningful review of the executive's power to strip individuals of the right to travel based on secret "derogatory information," possibly obtained through data mining

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[2] In arguing that their conduct was substantially justified because this is a case of first impression, defendants rely on three cases: *Edwards*, 834 F.2d at 802-03; *Commodities Future Trading Comm'n v. Frankwell Bullion Ltd.*, 99 F.3d 299, 306 (9th Cir. 1996); and *Minor v. United States*, 797 F.2d 738, 739 (9th Cir. 1986). *Edwards* and *Commodities Future Trading Comm'n* are distinguishable, because the matters of first impression in these cases concerned the interpretation of federal statutes – legal issues which receive *de novo* review. *See Edwards*, 834 F.2d at 798-99, 802-03 (interpretation of Omnibus Budget Reconciliation Act amendments to 42 U.S.C. § 602); *Commodities Future Trading Comm'n*, 99 F.3d at 301-04 (interpretation of the term "board of trade" as used in Commodity Exchange Act and exemptions found in 1974 Treasury Amendment). In contrast, there is no Congressional authorization for the TSC, which compiles the TSDB and its associated lists (RT at 389:17-390:2), which are implemented according to guidelines that the Executive Branch so far has been able to alter at will, with no meaningful oversight by the other two branches of government. Similarly, in *Minor*, 797 F.2d at 739, underlying opinion at 772 F.2d 1472, the court held the government was justified in seeking resolution of a doubtful issue of tax law. Here, the government unquestionably lacked a factual basis to believe Dr. Ibrahim herself was a terrorist threat.

of questionable reliability, and with no indictment or conviction. This is hardly the first case in this nation's history where government has attempted to cover up an error. Furthermore, it is black-letter law that the right to travel and right to freedom from incarceration, as well as the right to freedom from the stigma related to substantive deprivations, are all subject to due process protections. For all these reasons, defendants failed to carry their burden to show their actions were substantially justified.

III. DEFENDANTS ATTEMPTED IN BAD FAITH TO BLOCK DISCOVERY AT EVERY TURN FOR THE IMPROPER PURPOSE OF COVERING UP GOVERNMENT ERROR, NOT TO PROTECT NATIONAL SECURITY.

Defendants' discovery abuses entitle plaintiff to attorneys' fees, both as bad faith conduct under the EAJA and sanctionable conduct under the Federal Rules of Civil Procedure. Defendants unconvincingly characterize their obstructive tactics as part of their earnest effort to "proceed with discovery in stages." (*See* Opposition, at 9). In reality, defendants attempted to force plaintiff to the summary judgment phase without providing her relevant discovery, which this Court subsequently ordered produced and relied upon in entering judgment in her favor. If not for plaintiff's persistent pursuit of discovery and the Court's determination to allow relevant discovery, the federal defendants would have succeeded in their efforts to hide the truth.

Following the second Ninth Circuit remand, defendants were faced with the fact that they would have to respond to plaintiff's outstanding discovery requests like any other litigant. Defendants then unreasonably proposed to disclose only plaintiff's "current watchlist status, if any" to her counsel, and then proceed to summary judgment. (*See* Dkts. 406 and 417.) Defendants made this proposal with full knowledge of Dr. Ibrahim's factual innocence, Agent Kelley's egregious errors, Dr. Ibrahim's visa revocation "based on virtually no derogatory information," Dr. Ibrahim's suspicious REDACTED treatment, and other unclassified, non-sensitive facts that would bolster Dr. Ibrahim's procedural due process claims. The Court ordered defendants to produce the information. (*See*, *e.g.*, Dkt. 461.) Plaintiff would have obtained no information about her specific case from the federal defendants absent a motion to compel. *See* Fed. R. Civ. Proc. 37(a)(5) (sanctions warranted where a motion is required to compel discovery).

Similarly, plaintiff was only permitted to depose Agent Kelley following her motion for continuance, which defendants opposed. (*See* Dkt. 532 (granting the deposition of Kevin Kelley).) In opposing the motion for continuance, defendants stated that Agent Kelley's deposition and the depositions of others would be "inappropriate" and "wholly improper" because his testimony would reveal classified information. (*See* Dkt. 520 at p. 2). Defendants continued their unjustified fear-mongering in their trial brief, stating that trial could not proceed because the testimony of Agent Kelley would implicate classified information. (*See* Dkt. 602 at p. 9). Over defendants' objections, plaintiff took Agent Kelley's deposition and he testified at trial, providing important evidence upon which the Court ultimately relied.

Defendants also put the entire might of the United States into stymying discovery in this matter, enlisting the Director of National Intelligence, James Clapper, and the Attorney General of the United States, Eric Holder, to claim the state secrets privilege over unclassified information, such as the fact that Dr. Ibrahim was once the subject of an international terrorism investigation. (*See* Dkts. 471, 472.) This conduct casts doubt on all of defendants' invocations of the state secrets privilege, which is not to be invoked to "conceal violations of the law, inefficiency, or administrative error." State Secrets Policy, § 1(C), *available at* http://www.justice.gov/opa/documents/state-secret-privileges.pdf.

The Ninth Circuit has held that less egregious discovery abuses were bad faith. *See*, *e.g.*, *Brown*, 916 F.2d at 496-97 (government's inexcusable delay in providing documents to plaintiff combined with a statutory violation warranted finding of bad faith).[3] Defendants' treatment of

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[3] Furthermore, defendants' self-serving, conclusory statement that they had a "good faith misunderstanding of the Court's Orders regarding the timing of submission of the privilege logs and the entry of the protective orders" is not an adequate explanation for their violations of this Court's orders and is not due any credit. (*See* Dkt. 417; Fed. R. Civ. Proc. 16(f)(2) (sanctions for violations of pretrial orders).) The discovery cases cited by defendants concerning "a clerical mistake" and "an isolated incident" of delay are distinguishable. (Opposition, at 14, n. 6). As described above, defendants delayed production of meaningful discovery as part of their overarching strategy to dismiss this case without reaching its true merits. In addition, defendants' intentional stall tactics with respect to privilege logs and renegotiation of the Court's carefully crafted protective orders are not analogous to a party filing a pretrial statement three days late, or other situations in which minor scheduling errors have no detrimental effect. (*See id.*; Dkt. 416 ("The government and the government's senior trial counsel in this matter…are in violation of the Court's February 7 order…. The government's proposed protective orders…attempt to re-open the door on disputes decided long ago…. [T]he Court recalls that it

this litigation as a top-secret operation in which the enemies were an innocent woman, the Court, and the public, was bad faith.

IV. PLAINTIFF'S ATTORNEYS' FEES ARE REASONABLE FOR THE RESULTS OBTAINED AFTER NINE YEARS OF DIFFICULT WORK AGAINST A FORMIDABLE ADVERSARY.

A. Plaintiff's Counsel Properly Billed For Work On Related Claims.

Plaintiff properly billed for work spent on causes of action linked by common facts or related theories. *Hensley v. Eckerhart*, 461 U.S. 424 (1983) holds that where, as here, "a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have [her] attorney's fee reduced simply because the district court did not adopt each contention raised." *Id.* at 440 (emphasis added). "[T]here is no certain method of determining when claims are 'related' or 'unrelated.' Plaintiff's counsel … is not required to record in great detail how each minute of his time was expended." *Id.* at 437, n.12. In determining whether claims are related, the court may ask (1) whether the claims were premised on the same set of circumstances; (2) whether the claims "required virtually the same evidence;" (3) whether discovery conducted on unsuccessful claims also helped develop the successful claims; and (4) whether the same or different people were the prime perpetrators. *See Schwarz v. Sec'y of Health and Human Servs.*, 73 F.3d 895, 903-04 (9th Cir. 1995).

When plaintiff's claims revolve around a common set of facts or related legal theories, it is not unusual for counsel to spend time on the case in its entirety, making it difficult to break down time spent on a claim-by-claim basis. "Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley*, 461 U.S. at 435; *see also Schwarz*, 73 F.3d at 903 (*citing Herrington v. County of Sonoma*, 883

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worked hard in 2009 and 2010 for the entry of the prior protective order. It is disappointing that despite this hard work the government wishes to restart this process.") Here, although plaintiff prevailed in this matter, she and her counsel were nevertheless harmed by the delayed production of documents which could not be fully investigated and discussed, including a REDACTED produced at the last minute. (Under Seal Order Granting in Part and Denying in Part Motion to Compel Production of Unclassified Documents (Dkt. 515), pp. 3-4.)

F.2d 739, 747 (9th Cir. 1989); *Pate v. Alameda-Contra Costa Transit Dist.*, 697 F.2d 870, 872 (9th Cir. 1983) (A prevailing plaintiff is entitled to be compensated "for all work performed on any related issue which was advanced in pursuit of the ultimate goal of the action.").

Here, all of the constitutional claims involved a common core of related facts concerning the operation of defendants' watchlisting scheme and redress procedures. The other constitutional violations asserted – such as violation of equal protection and the First Amendment right to associate – were related to the procedural due process claim because improper motivation increases the risk of error and the chilling effect on religious and associational rights implicates the private interests at stake. (*See also* Under Seal Findings, p. 35:2-3 ("Although plaintiff's counsel raise other constitutional challenges, those arguments, even if successful, would not lead to any greater relief than already ordered.").) Plaintiff's constitutional claims rested on the same set of circumstances, required virtually the same evidence, involved the same discovery, and prosecuted misconduct by the same defendants. Counsel's work on those claims is therefore compensable because plaintiff would have had to do the same work for her due process claim as for her other claims.[4]

B. Claims Against The Non-Federal Defendants Were Related And Therefore Compensable.

To the extent possible, time related to claims solely against the non-federal defendants was deleted from plaintiff's total request. Defendants' argument as to the remaining time lacks merit. "[A]ttorney's fees are only appropriate for portions of the litigation made necessary by government opposition to legitimate claims of the party seeking the award." *Love v. Reilly*, 924 F.2d 1492, 1495 (9th Cir. 1991) (emphasis added); *see also Avoyelles Sportsmen's League v. Marsh*, 786 F.2d 631, 632 (5th Cir. 1986). Here, entries for issues involving the non-federal defendants were either directly related to or part of a common core of facts and issues associated

[4] Defendants' reliance on *Stewart v. Gates*, 987 F.2d 1450 (9th Cir. 1993) is misplaced. *Stewart's* reference to improperly submitted time records did not involve an alleged lack of specificity as to particular claims or comingling of time. (*See* Opposition, at 18:4-10.) Rather, the *Stewart* opinion addressed illegible and abbreviated time records (*id.* at 1453), neither of which is at issue here.

with the federal defendants, or, such as with the 2009 discovery disputes, arose only because of federal intervention in matters between plaintiff and the non-federal defendants. It strains reason for defendants to block plaintiff's discovery to the non-federal defendants, but then argue plaintiff cannot recover the fees generated as a result of defendants' obstruction.

C. Plaintiff's Bills Are Reasonable Because Of The Nature Of This Litigation.

(1) Conferences Billed Were Reasonable And Necessary.

"[C]onferences between attorneys to discuss strategy and prepare for oral argument are an essential part of effective litigation." *Contreras v. City of Los Angeles*, 2013 WL 1296763 (C.D. Cal. 2013). Matters discussed in attorney conferences were vital and necessary to the successful prosecution of the matter. The billing statements submitted provide sufficient detail for the Court to identify the time spent, and its purpose. Defendants' argument to the contrary lacks merit. No case cited by defendants requires any reductions in the fees sought.[5] The conferences in this matter contributed to the results obtained by allowing plaintiff to benefit from the insights of her entire legal team for an effective overall strategy.

(2) Plaintiff Staffed This Case Appropriately, Especially In Light Of The Number Of Defense Counsel Working On This Case.

Where multiple attorneys work on a complex matter, fees should not be denied unless the attorneys are unreasonably doing the same work. *See Johnson v. University College,* 706 F.2d 1205, 1208 (11th Cir. 1983); *Bouman v. Block,* 940 F.2d 1211, 1236 (9th Cir. 1991). Here, the attorneys and staff performed necessary non-duplicative work that advanced the case as a whole. The constitutional issues involved in this case required extensive factual and legal preparation.

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[5] *Tahara v. Matson Terminals*, 511 F.3d 950, 956 (9th Cir. 2007) simply says that an award should be reduced for "duplicative work." *Id.* at 956. It does not say that conferences *per se* fall under the duplicative category. *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 949 (9th Cir. 2007) specifically noted that the attorney's fee request said lead counsel previously had sole responsibility for several hundred matters similar to that one (*id.* at 949), while in *Zhang v. GC Servs., LP*, 537 F.Supp.2d 805, 813 (E.D. Va. 2008), the court pointed out that the case "was a relatively simple, straight-forward [one], free of any complex or novel issues." Neither of those observations applies here. Finally, while the court in *Keith v. Volpe*, 644 F.Supp. 1317, 1324 (C.D. Cal. 1986) did reduce time, it acknowledged that its decision to delete all time "reflected in nonserial entries involving conferences of three or more people[]" was a "rough-and-ready approach." It does not stand for the proposition that all non-serial conference time must automatically be struck from the fee request.

Multiple depositions were taken by both sides, including experts, many of which took place across the country or overseas. Numerous dispositive motions and discovery motions had to be litigated. Trial of this matter involved transporting approximately a dozen Bankers boxes of materials to and from Court every day.

Plaintiff's case needed four attorneys at trial. Two attorneys spoke in court presenting plaintiff's case, while the other two attorneys simultaneously prepared witnesses to testify, prepared motions and other papers, and assisted in presentation of the case. It was necessary for these attorneys to attend the proceedings, and they often stepped out as needed to attend to trial preparation tasks. Defendants had at least twice as many attorneys as plaintiff in the courtroom on each day of trial.[6]

Only where the evidence supporting the bill is "inadequate" should the fees be reduced. *Hensley*, 461 U.S. at 433. Hours actually expended are not to be disallowed without a supporting rationale. *United Steelworkers v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990); *Carter v. Caleb Brett LLC*, 2014 WL 350087 (9th Cir. Feb. 3, 2014), *1-2. Defendants "bear[] the burden of providing specific evidence to challenge the accuracy and reasonableness of the hours charged." *McGrath v. County of Nevada*, 67 F.3d 248, 255 (9th Cir. 1995). Here, plaintiff's counsel submitted detailed descriptions of the hours spent on this case, just as counsel would submit to a fee-paying client. Defendants cite no authority in support of their position that the descriptions provided are inappropriate or inadequate.

D. Plaintiff Incurred Additional Fees In Preparing This Reply.

Plaintiff incurred additional fees to reply the instant brief and has included the supporting documentation for those amounts with this brief. (Declaration of Elizabeth Pipkin in Support of

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[6] While defendants cite multiple cases to buttress their claim that plaintiff's fee request should be reduced due to trial overstaffing, none of these cases involved staffing issues for trial. One of defendants' cases actually supports plaintiff's position. *See Democratic Party of Wash. State v. Reed*, 388 F.3d 1281, 1286-87 (9th Cir. 2004). Considering all of the circumstances, the *Reed* court found it permissible to bill for attorneys who assist the attorney arguing the case, or who need to observe argument to understand how to proceed. *Id.* at 1287. That is exactly what happened in this case.

Plaintiff's Motion for Attorneys' Fees and Costs (Pipkin Reply Decl), ¶ 16, Exh. M.)

V. FEE ENHANCEMENT IS APPROPRIATE BECAUSE NO OTHER QUALIFIED ATTORNEYS WERE AVAILABLE, MUCH LESS THOSE WITH THE EXPERTISE OF PLAINTIFF'S COUNSEL.

A finding of bad faith under the EAJA entitles the prevailing plaintiff to attorneys' fees at normal market rates. *See Brown v. Sullivan*, 916 F.2d 492, 495 (9th Cir. 1990). Plaintiff has provided ample evidence that defendants acted in bad faith and that her attorneys' market-rate fees are reasonable. Alternatively, where the court declines to find bad faith but finds the government's position was not substantially justified, the EAJA permits a fee enhancement based upon special factors, "such as the limited availability of qualified attorneys for the proceedings involved." 28 U.S.C. 2412(d)(2)(A). This inquiry considers whether counsel possessed "distinctive knowledge" and "specialized skill" that was "needful to the litigation in question" and "not available elsewhere at the statutory rate." *See Nadarajah v. Holder*, 569 F.3d 906, 912 (9th Cir. 2009). Plaintiff has established the elements for rate enhancement.

Plaintiff's counsel's distinctive knowledge and specialized skill in applying constitutional law principles to the complex federal terrorist watchlisting system were required for plaintiff to prevail. Rate enhancement is proper where plaintiff's counsel's skillful application of law to complex issues results in a favorable judgment. *See Nadarajah*, 569 F.3d at 914. The *Nadarajah* court awarded enhanced fees to immigration attorneys even though specialization in immigration law by itself is not sufficient for enhancement, because "[plaintiff's] case involved more than established principles of law with which the majority of attorneys are familiar." *Id*. Aside from the complexity of the case, the court considered the plaintiff's voluminous appellate brief, the resulting published decision by the Ninth Circuit, the many authorities that later cited the decision, the "fairly unusual" relief that the plaintiff obtained (immediate release from immigration detention), the amicus curiae brief submitted in support of the plaintiff by Yale Law School, and the oral argument shown on C-SPAN. *See id*.

The instant case satisfies the fee enhancement requirements met in *Nadarajah*, and more. It is uncontroverted that the defenses raised in this matter involved difficult issues of constitutional law in the national security context, and required sophisticated advocacy at the

trial and appellate levels. The law generated by this case has been cited by dozens of cases and secondary sources. Multiple organizations joined in writing two amicus briefs for plaintiff in connection with her second Ninth Circuit Appeal, including Muslim Advocates, Asian Law Caucus, Center for Constitutional Rights, Bill of Rights Defense Committee, Asian American Justice Center, South Asian Americans Leading Together, Sikh American Legal Defense Fund, South Asian Network, Asian American Institute, Asian Pacific American Legal Center, and Sikh Coalition. As in *Nadarajah*, plaintiff's first oral argument to the Ninth Circuit was shown on C-SPAN and remains posted on that station's website today. The relief obtained in this case was not only "fairly unusual," but the first of its kind. *See Nadarajah*, 569 F.3d at 914. The Court's findings of fact and conclusions of law have been covered by many international news outlets, including the *New York Times*, which wrote about this case three times in the past three months.

As Dr. Ibrahim stated in her declaration, McManis Faulkner was the only law firm willing to take her case after unsuccessful consultations with "numerous attorneys, non-profit legal organizations, and private law firms in the Bay Area." Declaration of Rahinah Ibrahim, ¶ 3 (Dkt. 698); *see Nadarajah*, 569 F.3d at 915. Dr. Ibrahim's situation is therefore distinguishable from that of the plaintiff in *Love*, cited by defendants, who failed to establish that there were no "attorneys in the area with similar skills who would take the case at the statutory rate." *Love*, 924 F.2d at 1496-97.[7] Plaintiff obtained most if not all of the relief she sought, including corrections to defendants' lists and a name-clearing hearing through the trial of this matter, and defendants should pay fees accordingly. (*See* Dkt. 161, pp. 25-26; Dkt. 683; Under Seal Findings, p. 38.)

VI. PLAINTIFF'S COSTS ARE RECOVERABLE AND REASONABLE.

Prevailing plaintiffs under the EAJA are entitled to recover "costs that are ordinarily

[7] Defendants' statement that there are currently similar cases in federal courts is misleading because none of them is based in California. (*See* Opposition, at 23, n. 10 (listing cases from Oregon, Virginia, Michigan, and New York)). Plaintiff's great difficulty in procuring counsel is consistent with the observation of plaintiff's declarant, renowned Bay Area trial attorney Allen Ruby, who stated, "the vast majority of private law firms would not undertake pro bono litigation requiring the commitment that this case entailed." *See* Declaration of Allen Ruby, ¶ 7 (Doc. 697).

billed to a client" including "telephone calls, postage, air courier and attorney travel expenses." *See Int'l Woodworkers, Local 3-98 v. Donovan,* 792 F.2d 762, 767 (9th Cir. 1985). The expenses enumerated in Section 2412(d)(2)(A) are "set forth as examples, not as an exclusive list." *Id*. Here, plaintiff properly requested reimbursement for 10 categories of expenses (Exh. B to the Peek Declaration), for which plaintiff has now provided detailed itemizations. (Pipkin Reply Decl., Exhs. A-J.) All of these categories of expenses are compensable under the EAJA. *See* 28 U.S.C. § 2412(d)(2)(A) (expert witness fees recoverable); *Int'l Woodworkers, Local 3-98*, 792 F.2d at 767 (award of telephone, postage, courier, and attorney travel expenses); *United States v. Real Prop. Known as 22249 Dolorosa St.*, 190 F.3d 977, 985 (9th Cir.1999) (awarding printing expenses).[8] Four of the most significant expenses incurred were for photocopies ($40,265.30), online legal research ($98,717.67), attorney travel ($40,335.68), and expert fees ($88,446.01). These costs are justified given the length of this litigation, the several hundred briefs written at the trial and appellate court levels, and the factual investigation and legal research necessitated by this case. Moreover, because defendants steadfastly refused to allow Dr. Ibrahim into the United States, despite the fact that she poses no threat to national security, her deposition had to be taken overseas, at great expense to her counsel. In addition, defendants have not paid expert Jeffrey Kahn for his deposition time as required by law. It is therefore appropriate to award plaintiff the expense to compensate Professor Kahn. (*See* Pipkin Reply Decl., ¶¶ 12-15.)

VII. NOW IS THE TIME TO HEAR THIS MOTION.

The Court has discretion to hear plaintiff's fee motion at this time. *See Auke Bay*

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[8] *See also Natural Resources Defense Council v. Locke*, 771 F.Supp.2d 1203, 1218 (N.D. Cal. 2011) (awarding outside document production and mailing expenses); *In re Application of Mgndichian*, 312 F.Supp.2d 1250, 1266 (C.D. Cal. 2003) (awarding filing fees, Westlaw online legal research charges, and transcript, photocopy, facsimile, messenger service and postage expenses under EAJA); *Aston v. Sec'y of Health & Human Servs.*, 808 F.2d 9, 12 (2d Cir. 1986) (award of telephone, postage, travel, and photocopying expenses under EAJA); *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988) (telephone, travel, postage, and computerized research expenses compensable).

Concerned Citizen's Advisory Council v. Marsh, 779 F.2d 1391, 1393 (9th Cir. 1986); *see also League for Coastal Protection v. Kempthorne*, No. C 05-0991-CW, 2006 WL 3797911, *3-5 (N.D. Cal. Dec. 22, 2006). Congress enacted the EAJA to reduce the deterrents to those who would challenge unreasonable government action and to mitigate the disparity of resources between the government and private litigants. The long delay in this case compels awarding plaintiff fees at this stage because plaintiff has obtained substantial results at multiple stages. If fees are not awarded at this stage in light of the history of this case, defendants will have succeeded in making it so difficult to obtain relief and reasonable fees as to undermine the purposes of the EAJA. By delaying a fee award, the government deters good lawyers from taking meritorious cases involving defendants' error-ridden watchlists.

VIII. PLAINTIFF MET AND CONFERRED WITH DEFENDANTS ON THE FEES.

The parties have met and conferred on the telephone regarding the instant motion. (Pipkin Reply Decl., ¶ 15.) Defendants continued to assert (1) that the fee motion should be held in abeyance pending exhaustion of appeals, (2) that they did not act in bad faith, and (3) that plaintiff would only be entitled to *de minimis* fees, if any. Although plaintiff did not confer with defendants directly before filing her motion, plaintiff understood defendants' position on fees due to conversations with Judge Corley before the trial, and it was clear that a motion was necessary to resolve the dispute. Defendants' opposition demonstrates the futility of meet and confer to resolve the instant motion; defendants have suffered no prejudice. *See Prof'l Programs Grp. v. Dep't of Commerce*, 29 F.3d 1349, 1353 (9th Cir. 1994).

CONCLUSION

This case is the first to give the American people a way to challenge improper watchlist placement. *See Latif I*, 686 F.3d at 1130 ("At oral argument, the government was stymied by what we considered a relatively straightforward question: what should United States citizens and legal permanent residents do if they believe they have been wrongly included on the No-Fly List?"). Plaintiff's work in this case benefitted every American and deserves compensation. Plaintiff respectfully requests $3,673,215.00 in fees, $ 293,860.18 in expenses, and $ 6,124.97 to compensate Professor Kahn for his deposition time.

DATED: February 18, 2014

McMANIS FAULKNER

/s/ Elizabeth Pipkin
ELIZABETH PIPKIN

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